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No. 88-1044

# In the Supreme Court of the United States

OCTOBER TERM, 1988

ASSOCIATION OF SEAT LIFT MANUFACTURERS, ET AL., PETITIONERS

*v.*

DON M. NEWMAN, ACTING SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioners argue that the court of appeals erred in dismissing for lack of subject matter jurisdiction their complaint concerning the amount of reimbursement under Part B of the Medicare Act, 42 U.S.C. 1395j-1395w (1982 & Supp. IV 1986).

1. a. Medicare Part B is a voluntary supplemental insurance program that provides reimbursement for physician and related ancillary services, including durable medical equipment.[1] See 42 U.S.C. 1395*l*. Private insurance

[1] "Durable medical equipment" is defined as equipment that can withstand repeated use, primarily serves a medical purpose, and is not useful in the absence of illness or injury. 42 C.F.R. 405.514(b).

carriers administer this program under contracts with the Secretary of Health and Human Services (HHS) (42 U.S.C. 1395u(a)(1)). Suppliers or Medicare patients are paid 80% of the "reasonable charge" for services as determined by the carrier according to flexible guidelines set forth in the Medicare statute and regulations promulgated by the Secretary. See Section 1395u(b) and 42 C.F.R. 405.501 *et seq.*[2] See also Pet. App. 6b-15b (regulations and guidelines used by the carrier in determining the reimbursements at issue in this case). If a dispute arises over an amount of reimbursement, the statute provides for "a fair hearing by the carrier." Section 1395u(b)(3)(C). During the time period relevant to this dispute, however, the statute did not provide for administrative or judicial review of the carrier's determination as to the amount of reimbursement payable under Medicare Part B. See 42 U.S.C. 1395ff.[3]

b. Petitioners, a trade association of seat lift chair manufacturers and a retail supplier of seat lift chairs, sued in district court to set aside the determination by the insurance carrier, Nationwide, that $869.51 was the allowable "reasonable charge" for a seat lift chair under Part B. Pet. App. 18a. The district court described petitioners' claim as a challenge to "a determination of the amount of benefits under Medicare Part B," and concluded that

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[2] The carrier may set the "reasonable charge" at the "prevailing" or "customary" rate for a given service, see 42 C.F.R. 405.502(a)(1) and (2), but is also authorized to consider "[o]ther factors that may be found necessary and appropriate with respect to a specific item of service to use in judging whether the charge is inherently reasonable." 42 C.F.R. 402.502(a)(7). See also Pet. App. 18a.

[3] In 1986, Congress amended Section 1395ff to permit judicial review of certain Part B amount determinations for services furnished after January 1, 1987. These amendments do not apply to the claims in this case, which were based on services provided before that date. See Pet. App. 5a n.4.

under this Court's decision in *United States* v. *Erika,* 456 U.S. 201 (1982), judicial review was barred. Because the claim was not a "challenge to the statute or regulations relevant to the Medicare Program," Pet. App. 20a, the court further ruled that this Court's decision in *Bowen* v. *Michigan Academy of Family Physicians,* 476 U.S. 667 (1986), did not confer jurisdiction.[4]

c. The court of appeals affirmed. Noting that petitioners' "co-called 'method' challenge is actually a challenge to an amount determination[,]" the court held that "*Erika,* rather than *Michigan Academy,* is controlling" (Pet. App. 15a). The court rejected petitioners' claim that Congress intended to preclude review only of amount determinations involving small sums (*ibid.*), explaining that Congress "in fact precluded review of all Part B payment determinations * * * rather than only those specific determinations judged on a case-by-case basis to be 'minor' or 'trivial' " (*ibid.*). The court also found unpersuasive petitioners' contention that jurisdiction is available over "prospective challenges" to the Secretary's decision, observing that *Michigan Academy* drew no distinction between prospective challenges and actions arising in the context of an individual claim "where both challenges are directed at the Carrier's 'payment determination,' rather than the Secretary's regulations or instructions" (*ibid.*).

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, no further review is warranted.

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[4] The court rejected petitioners' attempt to invoke the *Michigan Academy* exception by "label[ling] certain internal memoranda as 'the Secretary's instructions,' " explaining that "the real nub of the controversy herein is the carrier's amount determination, not its method * * * " (Pet. App. 20a).

a. As we explained in our brief in opposition in *Kuritzky* v. *Blue Shield of Western New York, Inc.*, 850 F.2d 126 (2d Cir. 1988), cert. denied, No. 88-685 (Jan. 9, 1989),[5] this Court held in *Erika* that Section 1395ff, in the version pertinent here, precludes judicial review of Part B reimbursement determinations. This Court subsequently carved out a limited exception to that preclusion in *Michigan Academy*, 476 U.S. at 675-676, for review of the Secretary's regulations and directives prescribing the method to be used by the carrier in making reimbursement determinations.

As in *Kuritzky*, petitioners' claim falls within *Erika*'s proscription rather than *Michigan Academy*'s exception. Petitioners acknowledge that their suit "challenges the methodology 'as applied,' *i.e.*, the carrier's failure to comply with the Part B statute and implementing regulations" (Pet. 12). The lower courts therefore correctly held that petitioners' challenge was not to the prescribed guidelines for establishing a "reasonable charge," but to the carrier's application of the Secretary's directives in arriving at a particular "reasonable charge" amount.[6]

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[5] Petitioners acknowledge (Pet. 7 n.5) that the issue here is fundamentally similar to the question raised by the petition for writ of certiorari in *Kuritzky*, which the Court denied on January 9, 1989. We are serving a copy of our brief in *Kuritzky* upon counsel for petitioners.

[6] The court of appeals noted (Pet. App. 16a) that a "fair hearing" mechanism was available to adjudicate the validity of petitioners' claims, see 42 C.F.R. 405.801 *et seq.*, and had been invoked by one of the carriers in this case. The court concluded that "the existence of a hearing in the instant case significantly undercuts any argument for federal court jurisdiction" (Pet. App. 16a). Petitioners' attack on this statement (Pet. 16-18) is unavailing, as the correctness of the court's ruling does not depend on whether the availability of a carrier "fair hearing" always precludes judicial review.

Nor do this Court's decisions support petitioners' attempt to distinguish between payment determinations involving small amounts and those fixing the level of reimbursement for a class of claims. See Pet. 11-16. The determination of a categorical "reasonable charge," like an individual reimbursement decision, involves the carrier's implementation of the Secretary's prescribed methods to determine the amount of payment due for a service. This type of decision by the carrier is unreviewable under *Erika* regardless of the potential number of claims affected or the amount in controversy.

b. The First and Third Circuit decisions cited by petitioners apply *Michigan Academy* and *Erika* in a manner consistent with the appeals court ruling in this case. As we pointed out in our brief in opposition in *Kuritzky* (at 5), the Third Circuit in *Medical Fund-Philadelphia Geriatric Center* v. *Heckler,* 804 F.2d 33, 36-39 (3d Cir. 1986), recognized the distinction between a (reviewable) claim that the Secretary's policy is unlawful, and a (non-reviewable) claim that a policy is wrongly applied.

In *McCuin* v. *Secretary of Health & Human Services,* 817 F.2d 161, 165 (1st Cir. 1987), the plaintiff claimed that the Secretary's application of valid regulations concerning the reopening of Medicare Part A claims violated due process. Although the amount of the reopened claim was below the $1000 jurisdictional amount under Part A, see 42 U.S.C. 1395ff(b)(1) and (2), the court granted review on the ground that plaintiff's claim was the type of "substantial * * * constitutional challenge[ ] to the Secretary's administration" of the Act that this Court held reviewable in *Michigan Academy*. See *McCuin,* 817 F.2d at 165, quoting *Michigan Academy,* 476 U.S. at 680. The decision in *McCuin* is in some tension with the principle that jurisdiction is not available over administrative decisions involving the *application* of the Secretary's regula-

tions to individual claims. However, the *McCuin* court found jurisdiction "particularly appropriate here in view of the constitutional challenge" to the Secretary's enforcement of the statute, and relied on the constitutional dimension in granting review. 817 F.2d at 165. Since the instant case involves no claim of constitutional violation, *McCuin* is readily distinguishable and does not present a square conflict with the appeals court ruling below.[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[7] In any event, the recent amendment of the statute to permit review of Part B amount determinations on the same terms as Part A determinations deprives this case of ongoing significance and undermines petitioners' claim that it presents an issue that warrants this Court's consideration. See n.3, *supra*.

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